

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:MSR:AOK:OKL:TL-N-6281-99
ORLatrobe

date: MAR 2 2000

to: Chief, Examination Division, Arkansas-Oklahoma District

from: District Counsel, Arkansas-Oklahoma District, Oklahoma City

subject: Request for Advisory Opinion

Taxpayer: [REDACTED]

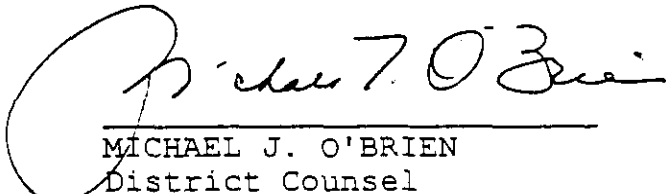
TIN: [REDACTED]

TYE: [REDACTED]

This is to confirm our previous telephonic advice with Group Manager John Palmer in further response to your request for an advisory opinion with respect to the proper signatory on proposed Form 872 extensions with regard to the above consolidated group. We responded to your original request for advice on December 3, 1999, subject to post-review by the National Office. Upon receipt of the post-review memorandum, we requested that the National Office reconsider their advice. Upon reconsideration, the National Office has agreed that the original advice of December 3, 1999, to your office was correct.

It is suggested that, if a Form 872 be sought of both [REDACTED] and [REDACTED], then preferably it be done on a single Form 872 executed by officers of both companies. We note, however, that there would be no hazards incurred if a separate Form 872 were obtained from each company.

If you have any further questions with respect to the above, please feel free to contact Mr. Osmun R. Latrobe of our office at Ext. 4815.


MICHAEL J. O'BRIEN
District Counsel

cc: CC:MSR:ARC(TL)
CC:MSR:ARC(LC)

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Internal Revenue Service

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Taxpayer: [REDACTED]

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This is in response to your request for an advisory opinion with respect to the proper signatory on proposed Form 872 extensions with regard to the above consolidated group. Our response follows.

ISSUES:

1. What is the proper name, caption, or language to use in the "name" field on the front of the Form 872?
2. What is the proper name, caption, or language to use in the "corporate name" field on the back of the Form 872?
3. Who would be authorized to sign the Form 872 on behalf of the [REDACTED] consolidated group?

FACTS:

The facts, as stated in your request, are as follows.

Prior to [REDACTED], [REDACTED] was the common parent to [REDACTED] [REDACTED] and several other subsidiaries. In [REDACTED] established [REDACTED] [REDACTED] in a transaction qualifying under I.R.C. § 351 (Diagram 1, attached). The [REDACTED] contributed the stock of all its subsidiaries, other than [REDACTED], to [REDACTED] resulting in the arrangement in Diagram 2. Then [REDACTED] "spun off" [REDACTED] and its subsidiaries to the [REDACTED] shareholders resulting in the structure shown on the left side of Diagram 3. After that transaction, [REDACTED] was merged with [REDACTED] [REDACTED] (EIN: [REDACTED]) with [REDACTED] being the survivor (see Diagram 4). However, since the old [REDACTED] shareholders remained in

excess of █% of the new █ the transaction was considered to be a reverse acquisition for consolidated return purposes and █ is considered as the successor to the old █. This is so even though the old █ (EIN: █) is no longer in existence [note that this is a conclusory remark (albeit correct) appearing in your statement of facts, and is not here stated as our opinion].

There is a potential that the Service may contest whether the above transaction qualifies as tax-free.

After the above transactions, both of the surviving parent corporations changed their name. █ (EIN: █) changed its name to █. █ (EIN: █) changed its name to █.

Later, in █, █ was acquired in a stock exchange with █. █ remains in existence, however, has retained its name, and is an operating subsidiary of █.

DISCUSSION:

Your office appears to have a good grasp of the issues and may proceed accordingly.

The structure of the above transactions is analogous to a common "shell game". The principle here is to "keep one's eye on the parent".

In its initial state (Diagram 1), the controlled group had a clearly defined parent, being █ (EIN: █). As provided in Treas. Reg. § 1.1502-77(a) the common parent of the group is the sole agent for each subsidiary of the group, and is duly authorized to act in its own name in all matters relating to the tax liability for the consolidated return year. This provision applies whether or not a consolidated return is made for a subsequent year, and whether or not one or more of the subsidiaries have become, or ceased to be, members of the group at any time. The leaving of the group by a subsidiary does not have the effect of limiting the scope of the agency provided by the regulation. Treas. Reg. § 1.1502-77(b).

Treas. Reg. § 1.1502-77(c) provides that an agreement entered into by the common parent extending the time within which an assessment may be made with respect to the tax for the consolidated return year shall apply to each corporation which was a member of the group during any such taxable year.

Diagram 2 illustrates the pre-spin off structure of the companies. Under the above principle, [REDACTED] ([REDACTED]) clearly remains at this point in time the parent of all the subsidiaries.

On the left side of Diagram 3 is illustrated the structure of the company after the spin off to the [REDACTED] shareholders. Again, under the above principles, [REDACTED] ([REDACTED]) remains the parent corporation and agent of the controlled group as to the previous taxable year, [REDACTED]. It will be noted that now there are two consolidated groups: one under [REDACTED] and the other under [REDACTED]. Thus for the then current taxable year, and thereafter, new groups would be in existence and new parent corporations, but only as to the post spin off taxable years.

The right side of Diagram 3 illustrates the subsequent merger of [REDACTED] ([REDACTED]) into [REDACTED] ([REDACTED]). At this point [REDACTED] was merged into [REDACTED], with [REDACTED] being the surviving corporation.

This situation is addressed by Treas. Reg. § 1.1502-76(b)(1)(C), which provides that any reference to a corporation, for the purposes of determining the membership in the group, includes a reference to a successor or predecessor as the context may require. This principle is illustrated by Treas. Reg. § 1.1502-76(b)(5), Example 2, in which it is stated:

P owns all of the stock of S and T. Shortly after the beginning of Year 1, P merges into T in a reorganization described in section 368(a)(1)(A)... and P's shareholders receive T's stock in exchange for all of P's stock. The P group is treated under § 1.1502-75(d)(2)(ii) as remaining in existence with T as its common parent.

Thus, Treas. Reg. § 1.1502-77(d), relating to the dissolution of a common parent does not come into play.

Diagram 4 illustrates that the above scenario is essentially what happened in the present case with the [REDACTED] shareholders owning a majority of the [REDACTED] shares after the merger with [REDACTED]. Based upon the above regulation and the illustrative

example, it is our opinion that [REDACTED] would thus become the parent corporation of the [REDACTED] group, and would assume [REDACTED]'s responsibilities, such as agent for the [REDACTED] group's [REDACTED] consolidated tax liabilities.

Subsequent to the above transactions, things begin to get complex, because [REDACTED] (which is not the parent of the old [REDACTED] group) changes its name to [REDACTED]. Simultaneously, [REDACTED] changes its name to [REDACTED]. The changes are mere name changes and the taxpayer identifications remain the same. Mere name changes have no effect on the structure of transaction for the purposes of determining the common parent. Thus, despite the confusing name change, [REDACTED] is the common parent for the [REDACTED] group as to the relevant taxable year, [REDACTED].

Then, in [REDACTED] of [REDACTED], [REDACTED] was acquired in an exchange of stock by [REDACTED]. It is presumed, but we are not certain, that [REDACTED] now files a consolidated return with [REDACTED]. Nevertheless, [REDACTED] does remain in existence as a corporation, and has retained its name, although as a subsidiary of [REDACTED].

This presents a potentially conflicting situation. While [REDACTED] remains the common parent of the [REDACTED] group, [REDACTED] is now the common parent of [REDACTED]. Since the determination of the common parent is made at the time of the original taxable year, it would be our opinion that [REDACTED] would be the proper entity to execute extensions as to that year. However, we would prefer to take a conservative approach and suggest that consents be obtained both from [REDACTED] and from [REDACTED], as [REDACTED]'s current parent.

Thus, with this foundation, we may now address the original issues.

Issue 1

What is the proper name, caption, or language to use in the "name" field on the front of the Form 872?

As to this point there is somewhat of a divergence between what may be legally required and what may be procedurally required under the Internal Revenue Manual. We would refer you to I.R.M. ¶ 4541.3, Parent and Subsidiary Company Consents. It would be our suggestion that the name of the taxpayer on the

first page read as follows, plus any additional wording required by the Manual and local procedure:

[REDACTED]
(EIN: [REDACTED]), now succeeded as parent by
merger with [REDACTED]
(EIN: [REDACTED]).

In the interests of conservatism, we would also suggest a second Form 872, describing the taxpayer as follows:

[REDACTED]
(EIN: [REDACTED]), now succeeded as parent by
merger with [REDACTED]
(EIN: [REDACTED]), a subsidiary of [REDACTED]
[REDACTED] (EIN: [REDACTED]).

It should be noted that I.R.M. ¶ 4541.3(3)(a) provides as follows:

The name of the parent and the number of subsidiary corporations named on the attached rider shall be inserted in the space provided for the name of the taxpayer on the Form 872. The rider attached to the Form 872 will contain a supplemental agreement and will clearly identify the parent corporation and the specific subsidiaries by showing the name, address, identification number, and the particular tax years with respect to which the Form 872 is applicable....

Issue 2

What is the proper name, caption, or language to use in the "corporate name" field on the back of the Form 872?

We would suggest that the language used in the "corporate name" section on the back of the Forms 872 be identical to that used on the front.

Issue 3

Who would be authorized to sign the Form 872 on behalf of the [REDACTED] consolidated group?

I.R.M. ¶ 4541.3(3)(b) provides the following guidance with respect to who should execute the Form 872 and rider:

Both the consent and the rider shall be executed on behalf of the parent corporation and the subsidiaries

named on the rider by a duly authorized officer of the parent corporation who is also a duly authorized officer of each of the subsidiaries, or has been specifically authorized to execute the consent by the powers of attorney executed by each of the subsidiaries. The consent must specifically show that the person signing for the parent corporation and the subsidiaries is signing in the capacity of an authorized officer of the parent corporation and as an authorized officer or attorney-in-fact for each and all of the listed subsidiaries.

We would suggest that beneath the signature of each required officer that there be a statement of the capacity in which he or she is signing, such as (for example):

Jane Smith
The President of [REDACTED] (EIN: [REDACTED]),
formerly [REDACTED] (same EIN),
the successor by merger to [REDACTED]
(EIN: [REDACTED]) and its subsidiaries, for the taxable
year [REDACTED].

Our office would suggest that (1) an authorized officer of [REDACTED], the parent corporation of [REDACTED], and (2) an authorized officer of [REDACTED] itself, as the parent of the old [REDACTED] group, execute the consents. Local implementation of I.R.M. 4541(3) may indicate the need for other signatories.

If we may be of further assistance in this case, please feel free to call Mr. Osmun R. Latrobe at 405-297-4815.

MICHAEL J. O'BRIEN
District Counsel

By: /s/ OSMUN R. LATROBE
OSMUN R. LATROBE
Acting Assistant
District Counsel

Attachments

Copies of your diagrams for reference

cc: CC:MSR:ARC(TL)
CC:MSR:ARC(LC)